bona fide purchaser under the proviso to sub-section (1); and I think the effect of the statute is to go behind any transactions there may have been (other than those to *bona fide* purchasers, as defined) to enable this to be done.

The section expressly says that the discharge of the land shall be void against any person claiming through the chargor. These words appear to me to cover any transactions there may have been before or at the time of the discharge. The appellant cannot in my view claim the benefit of the priviso, because that covers only transactions which take place after the discharge and the transaction upon which he relies did not take place after but before the discharge of the charge to the Chettiar. In my view, therefore, he is liable equally with the other mortgagors to take whatever steps are necessary either to reinstate the original mortgage or to replace it. In this case he has been ordered to replace and the transaction of the 30th January, 1945 must to this extent give way to that order. I can, therefore, see no reason to disturb the order made by the learned Judge in the Court below, and I would dismiss this appeal with costs.

Wilson, J. : — I have read the judgments of Taylor, J. and Spenser Wilkinson, J. in this appeal. I agree that the appeal should be dismissed with costs, and have nothing to add.

Appeal dismissed.

KHOO SOO JIN & ANOR. v. LYE YEW SONG.

[Court of Appeal (Taylor, Spenser Wilkinson and Wilson, JJ.) November 19, 1951]

[F.M. — Civil Appeal No. 25 of 1951]

Debtor and Creditor (Occupation Period) Ordinance, 1948, ss. 4(2)(b)(ii) and 11 — Mortgage — Entry into a possession by mortgagee.

The Court of Appeal dismissing the Appeal further — **Held**, that entry into possession by a mortgagee may amount to a continuing demand within the meaning of the Debtor and Creditor (Occupation Period) Ordinance, 1948, s. 11.

Cases referred to :—

(1) *Bovill v. Endle* (1896) 1 Ch. at p. 651.

(2) *Ex Parte Wickens* (1898) 1 Q.B.D. 543

(3) *Ibrahim & Co v. Nainam Sahib & Co.* (1951) M.L.J. 103; 2 M.L.R. 71.

(4) *Chin Thin Sin v. Ng Kwan Heng* F.M. — Civil Appeal No. 28 of 1950 (Unreported).

COURT OF APPEAL, appeal from the judgment of Jobling, J. reported in (1951) M.L.J. 74.

F. G. Pooley for the appellants.

R. D. Hume and *G. H. Conaghan* for the respondent.

The facts and arguments appear sufficiently from the judgments.

Cur. Adv. Vult.

Taylor, J. : — This appeal raises a short question of the construction of the Debtor and Creditor (Occupation Period) Ordinance, 1948.

Before the war the testator, now represented by the respondent, mortgaged certain property to the appellants for $25,000. During the enemy occupation the mortgagor was in difficulties, the interest was in arrear and in March 1944 another creditor obtained the appointment of a receiver by way of execution. The mortgagee went into possession of the property, as he now says, merely to protect his security and not with a view to enforcing payment of the principal; he collected the rents, which exceeded the interest, until the mortgagor paid off the principal; this was in June 1945.

After the war the mortgagees claimed the difference between the original mortgage debt and the value of the depreciated currency but the application was refused and they now appeal.

The principle of the Ordinance is simple. If, during the occupation, a creditor demanded Japanese currency in payment of a pre-war debt, and received it within three months of the demand, then he received what he asked for and the transaction is closed. But if a debtor, to suit himself, paid off a debt with cheap money so that the payment was really worth only a fraction of the debt, then the payment must be revalued and the debtor must pay the difference. The Ordinance is designed to relieve either the debtor or the creditor according to circumstances. The test is demand. It need not be formal or even explicit. It is provided that the mere rendering of an ordinary tradesman's bill may be a sufficient demand and it was conceded in argument that service of a writ would constitute a demand although the writ containted no rogatory word. It is, I think, obvious that if the bill or writ never reached the debtor he would not be affected. Similarly, if a mortgagor were away from home and remitted the money before he heard that the mortgagee had entered, he would have paid without demand. In short, the demand may be oral or written, formal or informal,

express or implied, but it must be communicated to the debtor. Where the demand was not explicit the question must be : — What was the effect on the mind of the debtor? If in the circumstances he reasonably thought that he was called upon to pay a legal debt, the step taken would amount to an implied demand.

In this case the mortgagee says that he did not act voluntarily, that he was compelled to protect his security, but this is not wholly correct. The other creditor's receiver could not override the mortgage. It may well be that in the circumstances of that time the mortgagee might have had difficulty in dealing with the receiver and that it was prudent to take possession before the receiver could extract his order and begin to collect the rents. There is a finding that the mortgagee wished only to make sure of collecting the interest and did not intend to recover the principal but he never communicated this to the mortgagor. If he had written to the mortgagor that he was acting only to protect his security and did not intend to call in the principal money, then an implication of demand would not have arisen but in the absence of any such communication the mortgagor could only suppose that the mortgagee intended the ordinary legal consequences of his taking possession. These are that the rents are applicable primarily to interest; the mortgagee may apply the surplus towards reducing the principal or he may pay it to the mortgagor, or for his benefit as by keeping down the interest on a subsequent incumbrance. In this case he retained the surplus, amounting to nearly $1,000, and applied it in his accounts to reduction of principal. The amount was small, especially having regard to the mortgagees liability for repairs, but the retention must have tended to make the mortgagor think that the security was being enforced as to principal as well as interest.

The learned trial Judge said that principal and interest cannot be separated. If this is taken as a proposition of law it requires qualification but having regard to its context I do not think it was so intended. Interest and principal can be separated but in this case they were not. The mortgagee never offered to give up possession if the interest was paid and he in fact continued in possession after all arrears had been collected.

A mortgagee already has the legal estate; if he also takes possession the mortgagor has nothing left but his bare equity of redemption; he cannot resume enjoyment of his property until he pays off the principal debt.

Two English cases were cited but a decision as to what constitutes a demand for one purpose does not necessarily govern the meaning of "demand" in a later statute passed for a different and special purpose; nevertheless the cases are helpful. *Bovill v. Endle*[1], and the earlier authorities there cited show that a mortgagee who has demanded payment cannot also have interest in lieu of notice, that taking proceedings implies demand and that entering into possession is, for that purpose, equivalent to taking proceedings. It would not be consistent with these authorities to say that taking possession, (unless qualified or explained in some such manner as I have indicated) does not amount to a demand within the meaning of the Debtor-Creditor Ordinance. *Ex Parte Wickens*[2], does not carry the matter any further because in that case there were three express demands, one before seizure, one in the warrant itself and one for the balance when four-fifths of the claim was tendered.

There is, however, a separate question; granted that entry equivalent to demand, the debt was not paid within three months of the entry. Unless possession constitutes a continuing demand the statute will not avail the debtor. The learned trial Judge held that remaining in possession was a continuing demand. On this point there is no authority.

Can there be a continuing demand? Suppose that a creditor went to his debtor's shop in the morning and said : — "I will stay here till the money is paid" and in fact stayed there, in silence, all day. Could it be said that the demand did not continue throughout the day? Suppose that during the occupation a judgment creditor levied execution on a pre-war decree on February 1; that the sheriff held the goods till the 14th when a friend of the debtor persuaded the creditor to withdraw on a promise of payment and that the debtor paid in full on May 10. Could it be said that the payment was not within three months of the last demand? In my opinion taking possession by a mortgagee approximates to seizure and continuing possession in either case is a continuing demand.

There is one further point. The mortgagee is the applicant; he claims revaluation; he can have it only if the payment was made without demand. The onus is on him to prove that there was no demand within three months of the payment, *Ibrahim & Co. v. Nainam Sahib & Co.*[3]. It seems to me therefore that where the question is one of implied demand it is for the

applicant to show that in the circumstances the respondent cannot fairly be taken to have supposed that payment was demanded.

For all these reasons I am of opinion that the judgment of the learned trial Judge was correct and should be affirmed, with costs.

Spenser Wilkinson, J. : — The claim in these proceedings was for reinstatement of a mortgage and revaluation of the mortgage debt under the provisions of the Debtor and Creditor (Occupation Period) Ordinance, 1948.

The sole question of fact to be decided at the hearing was, as is usual in such cases, whether or not there had been a demand for repayment of the money within the meaning of section 4(2)(b)(ii) of the Ordinance. Upon the evidence before him the learned Judge found the following facts :—

(a) That no verbal or written demand was made by the applicants;

(b) That in March, 1944 the applicants in exercise of their rights as mortgagees went into possession of the mortgaged property;

(c) That the applicants went into possession because a Receiver had been appointed of the respondent's lands and that they wished to protect their interests; the applicants only wished to secure payment of the interest on their mortgage and had no intention of repaying themselves the principal.

On the authority of the cases of *Bovill v. Endle*[1] and *Ex Parte Wickens*[2] the learned Judge then held that the action of the appellants in going into possession was in effect a demand for payment and that as long as they continued in possession it was a continuing demand.

The relevant part of section 4 of the Ordinance in question reads :—

"(2) In any case —

(b) where such payment was made after the thirty-first day of December, 1943, in occupation currency in respect of a preoccupation capital debt, exceeding two hundred and fifty dollars in amount which—

(ii) if due, was not demanded by the creditor or by his agent on his behalf and was not payable within the occupation period under a time essence contract; or

(iii) if due and demanded as aforesaid was not paid within three months of demand

.....

such payment shall be revalued....."

In sub-section (3) of the same section it is laid down that the word "demand" includes the rendering of an account for goods supplied or services rendered.

It was argued for the appellants that in this section the word "demand" covers only an express demand and that sub-section (3) deliberately extends the meaning to one form of implied demand only and no further. I doubt whether the meaning of the section can be so limited. I think any action or conduct which clearly and unequivocally acts upon the mind of the debtor as a demand would be covered by the wording of the section.

The question then to be decided is whether entry into possession by a mortgagee amounts in law to a demand for repayment of the principal debt. In *Coote on Mortgages* (9th edition) page 827 the position of a mortgagee when he enters into possession is set out in two paragraphs as follows :—

"A mortgagee, when he enters into possession of the mortgaged estate, enters for the purpose of recovering both his principal and interest, and may apply the rents and profits received by him in or towards payment thereof accordingly.

A mortgagee in possession is not, however, bound to apply the surplus rents after keeping down his interest and outgoings in gradual reduction of principal; he may, if he thinks fit, pay such surplus rents to the mortgagor ....."

I think these two passages correctly represent the law on the subject, and the result appears to me to be that if the mortgagee does not require repayment of the principal, as may frequently happen, he has the right to confine himself to the collection of interest; but if he does not wish his re-entry to be construed by the mortgagor as a demand for the repayment of principal as well as interest I think it is incumbent upon him to inform the mortgagor accordingly. In the present case far from indicating to the mortgagor that repayment of principal was not required or demanded the letter informing the receiver that the appellants had taken possession of the property specifically states the principal sum of $25,000 and a considerable amount of arrears of interest is still due and owing.

The learned Judge has found that there was ample evidence that the mortgagees entered into possession only to protect their security; but he has not held, and I am unable to find any evidence in the record to suggest, that this intention of the mortgagees was ever communicated in any way to the mortgagor. Whilst therefore I would not be prepared to hold that entry into possession by a mortgagee invariably amounts to a demand for the repayment of principal and interest I am of opinion that in the present case the entry amounted to such a demand.

The next question is whether this demand was a continuing demand because payment was not made within three months of the entry. It was contended by the appellants that no such thing as a continuing demand was contemplated by the section above quoted.

It was suggested that because paragraph (iii) of subsection (2) refers to the specified period of three months after demand that only a specific demand at a definite time was contemplated. I have come to the conclusion, though not without all doubt, that the wording of the Ordinance is apt to cover a continuing demand and that an entry into possession by a mortgagee which constitutes a demand for the repayment of principal is such a continuing demand. In the case of a straightforward demand of a simple debt its effect diminishes with the passage of time, because if the creditor does not repeat his demand this indicates to the debtor either that the creditor has changed his mind or that the demand is not to be taken very seriously. The Ordinance appears to me to have recognised this and has fixed the period of three months as the usual maximum period during which a demand remains effective. In the case of an entry into possession, however, if the mortgagee changes his mind he would have to take some active step as going out of possession or communicating to the mortgagor before the mortgagor could have any means of inferring that there had been any change. I think, therefore, that in the circumstances of this case the learned Judge was right in holding that as long as the mortgagees continued in possession this constituted a continuing demand.

I would, therefore, dismiss this appeal with costs.

Wilson, J. : — The appellants claim revaluation under the Debtor and Creditor (Occupation Period) Ordinance, 1948, for a pre-occupation debt which was repaid in Occupation currency and reinstatement of the security formerly held in respect thereof. The questions for decision in this case are whether or no the appellants demanded repayment, and if so, whether or no payment was made within three months of the demand.

The appellants are the Executors and Trustees of the Estate of Khoo Chooi Beng, deceased, and the respondent is the Executor and Trustee of the Estate of Yoon Ah Yee, deceased. The facts are that Yoon Ah Yee mortgaged certain property to Khoo Chooi Beng on the 21st January, 1938 to secure the repayment by her of the principal sum of $25,000 with interest thereon. On the 17h day of March, 1944, the appellants in exercise of their rights as mortgagees went into possession of the property in question, and the respondent urged at the trial and before this Court that the entry into possession constituted a continuing demand for repayment of the whole debt. The learned trial Judge has found that the appellants entered into possession only to secure payment of the interest of the mortgage and had no intention of repaying themselves the principal. Before the appellants went into possession of the property a receiver had been appointed by a Japanese Court and by a Notice dated 17th March, 1944, addressed to the receiver, Mr. Lim Gim Hoe, on behalf of the appellants informed the receiver that the appellants had taken possession of the property and would collect the rent in future. In this letter the following passage appears :—

> ".....the above property which forms part of the Estate of Yoon Ah Yee was mortgaged to the Testator for the sum of $25,000/– repayable on a certain day therein mentioned and since past together with interest thereon which said sum of $25,000/– and a considerable arrear of interest is still due and owing to my clients from the Estate of the said Yoon Ah Yee deceased."

In these circumstances and with reluctance I am unable to agree with the finding of the learned trial Judge that the appellants went into possession of the property only to secure payment of the interest on their mortgage. It is true that in an affidavit dated the 27th September, 1950, the appellants so stated but in my opinion this contemporary notice signed by the appellant's then solicitor shows quite clearly that the appellants in fact entered into possession for the purpose of securing the repayment of the capital sum as well as the interest.

In disagreeing with the learned trial Judge on what may be considered a question of fact I would explain that I do so on documentary evidence, and not on the demeanour of witnesses, and in this connection I would refer to the judgment of the Court of Appeal in *Chin Thin Sin v. Ng Kwan Heng*[4].

In the circumstances I do not think it is necessary to consider whether or no entry into possession by a mortgagee necessarily amounts to a demand for repayment of a debt within the meaning of section 4(2) of the Debtor and Creditor (Occupation Period) Ordinance. It seems to me that in the circumstances of this case entry into possession by the mortgagees was definitely a demand for the payment of the whole debt outstanding. I agree with the learned Judge that as the appellants remained in possession until the debt due was paid their possession was a continuing demand, and therefore payment must be held to have been made within three months of the demand.

For these reasons I would dismiss this appeal with costs.

Appeal dismissed.